

1 A I'm not aware of that, of the legal
2 proceedings associated with that. And let me say,
3 with respect to your question regarding Mr. Wise, I
4 set out to do independent research and did a great
5 deal of industry research, and thought it would be
6 appropriate and prudent for me to do my own research
7 and reach independent conclusions based on the
8 information, you know, that I was able to obtain and
9 took under advisement. And that was my methodology.

10 Q But I believe we closed yesterday
11 afternoon with you agreeing that you did say at your
12 deposition that you were "not rendering an independent
13 analysis or calculation," and that your task was only
14 to analyze the appropriate method for calculating fair
15 market value; right?

16 A That's true.

17 Q Okay. Now a few final questions on the
18 mechanics of Gulf's replacement cost calculations.
19 Gulf never explained to you why it is departing from
20 the FCC rate regulations governing allocation of space
21 on utility poles; right?

22 A No, I don't know that they have given me,

1 you know, a formal explanation of why they chose to
2 calculate things the way they did.

3 Q And you know that space allocation is one
4 of the three components that go into their replacement
5 cost calculations; right? One being pole investment,
6 the other carrying charge, and the third space
7 allocation?

8 A Yes.

9 Q Okay. At the time of your deposition, you
10 didn't know if Gulf included itself in the figures for
11 average number of attachers that it used in a space
12 allocation, did you?

13 A At the time of my deposition, I'm not --
14 I don't -- I couldn't recall at that point, no.

15 Q Okay. And another question on space
16 allocation. In your testimony on page 12, you
17 question the treatment under the statute, section 224,
18 that provides for different formulas for cable pole
19 attachments and telecom pole attachments, don't you?

20 A Page 12 of what document?

21 Q Of -- I believe it's your testimony.

22 A Oh. Okay. I'm sorry. I was looking at

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1 my deposition.

2 Q Yes, it's page 12 with a question from an
3 evaluation perspective, are there other problems with
4 the fact that FCC's telecommunication and cable
5 formulas are yielding different rates.

6 So my question, for clarity, was you
7 questioned the treatment under the FCC regulations
8 that provides for different formulas for cable pole
9 attachments and telecom pole attachments; right?

10 A In the context of traditional business
11 valuation, yes, that's true. And that's my point,
12 that taken in the context of traditional business
13 valuation, that's problematic.

14 Q Okay. And you say from your
15 "perspective," as a valuation analyst, it is not
16 appropriate for the two formulas to arrive at a
17 different rate to charge different attachers for the
18 same space; right?

19 A I think that's true, yes.

20 Q But that's what Congress actually decided,
21 right, to have one method to allocate space for cable
22 and another for providers of telecom services; right?

1 In section 224?

2 A As I understand 224, that is what is
3 prescribed.

4 Q Okay. Do you know that the Eleventh
5 Circuit found in the Alabama Power case that you said
6 you read that it is relevant that the telecom rate
7 provided in 47 USC 224(e) yields a higher rate for
8 telecommunications attachments than the cable rate
9 provides for pole attachments?

10 MR. ESTES: Your Honor, I'm going to
11 object to the extent he mischaracterized the Eleventh
12 Circuit opinion.

13 JUDGE SIPPEL: Finish your sentence. I
14 can't hear you, Mr. Estes.

15 MR. ESTES: I'm not positive if it's an
16 accurate characterization of the Eleventh Circuit.

17 JUDGE SIPPEL: I'm going to sustain the
18 objection. You want to ask him -- well, you're going
19 to have to get the section of the paragraph wherever
20 it is and put it in front of him. Either that, or put
21 it up on the screen.

22 MR. COOK: Let's do that. May I bring up

1 -- I believe it's Complainant's Exhibit 47.

2 (Pause.)

3 MR. COOK: If we could bring up
4 Complainant's Exhibit 47.

5 BY MR. COOK:

6 Q Turn to page 10 of the Alabama Power
7 Eleventh Circuit opinion.

8 JUDGE SIPPEL: That will pull it up for
9 you, Mr. Spain.

10 MR. ESTES: It's page 10?

11 MR. COOK: It's page 10, upper right-hand
12 corner of the page.

13 JUDGE SIPPEL: Show what you want --

14 MR. COOK: We can highlight this footnote
15 here.

16 (Pause.)

17 THE WITNESS: I can read it.

18 JUDGE SIPPEL: Okay. Can you?

19 THE WITNESS: I can read it.

20 JUDGE SIPPEL: Fine.

21 BY MR. COOK:

22 Q And my question was, from your

1 recollection, reading the Alabama Power opinion, do
2 you know that the Eleventh Circuit found that -- and
3 I'll just read:

4 "Since marginal cost provides just
5 compensation so long as these factors are absent, it
6 is irrelevant that the telecom rate provided in 47 USC
7 224(e) yields a higher rate for telecommunications
8 attachments than the cable rate provides for cable
9 attachers."

10 Did you know that?

11 A I have read that, and it's difficult for
12 me to interpret that as I sit here without preparing
13 for it. For one, I'm not sure what factors are being
14 referred to in the beginning of that, and secondly,
15 I'm not a lawyer and don't want to overstep my bounds
16 and try to interpret law or legal opinion.

17 Q But in your testimony on page 12, while
18 you may not be interpreting law or legal opinion, you
19 are testifying that from your perspective as a
20 valuation analyst, it is not appropriate for the two
21 formulas to arrive at different rates to charge
22 attachers for taking virtually the same space; right?

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1 A That's -- yes, that's my opinion.

2 Q Okay.

3 MR. COOK: Your Honor, I am close to the
4 end of my examination, and I would ask for some
5 guidance from the Court on a limited area of
6 questioning based on something that Your Honor had
7 said yesterday. I had started before Mr. Spain got
8 up, and moved to strike a limited portion of his
9 testimony on page 22 and 23 that related to the -- is
10 it the American Public Power Association handbook.

11 JUDGE SIPPEL: Right.

12 MR. COOK: And that was Gulf Exhibit 61
13 that Your Honor ruled would not come into evidence.

14 JUDGE SIPPEL: Correct.

15 MR. COOK: Yesterday there was a brief
16 discussion where I'm not sure you wanted me to ask
17 questions. I would, if permitted and if you think
18 it's appropriate, ask three, four, maybe five limited
19 questions on this in pursuit of supporting my request
20 to have that removed, but I would not want to open the
21 door to reversing Your Honor's ruling about 61 coming
22 into evidence. And so the questions would be in the

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1 nature of who gave him this information, when did he
2 get it, what is the date of the information, and if
3 Your Honor thinks it is not necessary, I'll just move
4 on by. But I wanted to ask your guidance on that.

5 JUDGE SIPPEL: It sounds like you want to
6 have your cake and eat it, too, in a sense. Well,
7 that's all right. If you want to -- now let me put
8 this in context. The witness's testimony refers to
9 this -- what is it called AARRP, or something like
10 that?

11 MR. COOK: AAPA, Your Honor.

12 JUDGE SIPPEL: AAPA. And it's a brochure,
13 it's a document that was prepared -- it's a thick
14 document that was prepared by basically a trade
15 association, and it's got a lot of legal conclusions
16 and all kinds of conclusions in it, and so I rejected
17 it. And but yet that document or that information,
18 whatever is in there, is referred to in the witness's
19 testimony as one of the references that he used.

20 MR. COOK: And this actually describes --
21 it's more of a description --

22 JUDGE SIPPEL: Well, let's point to the

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1 parts of his testimony you're talking about.

2 MR. COOK: Okay.

3 JUDGE SIPPEL: The written testimony.

4 MR. COOK: The written testimony starts on
5 page 22.

6 JUDGE SIPPEL: Okay.

7 MR. COOK: And the question is what does
8 your industry research reveal, and there is an opening
9 sentence, saying, "My research has revealed a general
10 sense among electric cooperatives and municipal
11 electric utilities that they have been and still are
12 undercharging cable television companies for access to
13 their poles."

14 Then begins a section, "Similarly, the
15 American Public Power Association pole attachments
16 workbook states."

17 The next sentence also says, "The pole
18 attachment workbook states."

19 And if you go around to page 23, there is
20 an intro sentence in the answer about correcting
21 inherent flaws in the FCC's formula, but then the next
22 three sentences are essentially the AP agreement

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1 applies, it takes into account a portion -- it's a
2 description of what the content is from the APPA
3 handbook or workbook that Your Honor struck, and I
4 would not want to ask this witness questions that
5 would lead to a reversal of your ruling, but if you
6 were saying to me, well, Mr. Cook, you haven't made
7 your case for striking this now --

8 JUDGE SIPPEL: That's too broad and
9 abstract for me to handle. You want to ask him what
10 the date of the publication was?

11 MR. COOK: Sure.

12 JUDGE SIPPEL: Ask him about the date of
13 the publication was.

14 BY MR. COOK:

15 Q Do you know what the date of the
16 publication is?

17 A The exact date I can't recall, no.

18 JUDGE SIPPEL: Well, some kind of a
19 timeframe?

20 THE WITNESS: The answer -- I think it's
21 roughly, you know, 2003 or so. That's the best guess.
22 And I'm --

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1 JUDGE SIPPEL: Okay. All right. All
2 right. But you think it's in the 2000 range?

3 THE WITNESS: Yes, sir. It's a fairly
4 recent document.

5 BY MR. COOK:

6 Q If I told the witness that the cover page
7 just inside the front says that it's October 2002,
8 would that refresh your recollection?

9 A I'll accept that.

10 Q Okay. And that's fine. I wanted to --

11 JUDGE SIPPEL: Is there anything more?

12 BY MR. COOK:

13 Q The only other thing would be one other
14 question only, and that would be you hadn't looked at
15 this as of the time of your expert report; right?

16 A At the time of my report, no.

17 MR. COOK: Okay. No further questions on
18 that subject then, Your Honor.

19 JUDGE SIPPEL: At the time of the --

20 MR. COOK: The expert report when he had
21 given his summary of opinions on March 3rd.

22 JUDGE SIPPEL: All right, but slow down.

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1 You're talking about that's when I required the
2 parties to exchange the outline of the summary of the
3 report of the expert testimony?

4 MR. COOK: Exactly.

5 JUDGE SIPPEL: Under rule 26 of the
6 Federal Rules of Evidence. Right?

7 MR. COOK: Yes, Your Honor.

8 JUDGE SIPPEL: All right. Thank you. I
9 have to have context.

10 MR. COOK: Then I only have a couple of
11 concluding questions, and then I'm going to be done.

12 BY MR. COOK:

13 Q Mr. Spain, replacement cost is based on
14 the principle of substitution; right?

15 A That's fair, yes.

16 Q And you agree that it's not really
17 feasible for cable attachers to build or to duplicate
18 Gulf Power's entire pole system; right?

19 A I don't think that's practical. I'm not
20 an operations guy, but my understanding is that's not
21 practical.

22 Q Okay. And you agree that cable can't

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1 realistically reproduce the entire elevated corridor
2 of which you speak; right?

3 A The -- I don't think, as I understand it,
4 they can reproduce the entire elevated corridor.
5 However, as I mentioned earlier, I understand they
6 have an option available to them of going underground.

7 Q But you agree they can't reproduce the
8 elevated corridor?

9 A I agree with that.

10 Q Okay. And you also agree, though, if I'm
11 correct that replacement cost is -- if replacement
12 cost is the cost to the cable company that it would
13 pay to go out and put up -- I'm sorry. Let me
14 rephrase that.

15 When I have asked you if replacement cost
16 is the cost that the cable company would pay to go out
17 and put up the poles themselves, you have agreed that
18 under the Gulf Power cost structure, that is certainly
19 the case; correct?

20 A Right. And my point is that the
21 replacement cost as calculated by Gulf Power is the
22 cost associated with erecting poles or a pole at --

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1 within Gulf Power's cost structure. That's my point.

2 MR. COOK: No further questions, Your
3 Honor.

4 JUDGE SIPPEL: All right. I think I'm
5 probably in a position now to rule on this question
6 about -- what is it you were moving to strike?

7 MR. ESTES: The response to the APPA
8 workbook issue, something that Mr. Cook has raised
9 again this morning.

10 JUDGE SIPPEL: The APPA, that was the --
11 now what you did is you moved to -- you objected to
12 that proceeding into evidence, and I ruled in your
13 favor, right, on the basis that it contained exhibits
14 --

15 MR. COOK: On Exhibit 61, that's right.

16 JUDGE SIPPEL: So it's not in the record.
17 The witness, however, has referred to it in his
18 testimony, as you have just outlined, and your problem
19 is you are trying -- in your trial brief you had moved
20 to strike that portion of his testimony which refers
21 to the --

22 MR. COOK: That is not correct, Your

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1 Honor. In the trial brief we moved in section V(4) to
2 strike all of Mr. Spain's testimony for the reasons
3 set forth therein, and I think given the cross-
4 examination we have conducted, we are content to rest
5 on the cross and on the briefing set forth there for
6 that argument of striking all of the testimony. The
7 APPA is a separate argument which we had advanced
8 should you not decide to strike all of the testimony.

9 JUDGE SIPPEL: So -- all right. Well, let
10 me get to it. I'm going to hear from you, Mr.
11 Campbell, in just a second, but let me say that I'm
12 not going to strike -- I'm not going to strike the
13 portions of the witness's transcript that refers to
14 that manual, the APPA manual, because under one
15 theory, under one approach, that manual could be
16 received into evidence and then this witness wouldn't
17 have to testify about it, or this witness testifies
18 about a subject matter and we leave the APPA manual
19 out as being duplicative and every other
20 categorization under rule 403. All right?

21 So it's confusing, it's excessive, it is
22 questionable in terms of how you would even cross-

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1 examine it. And so I'm sticking with my ruling of
2 keeping it out, but I am permitting the witness to
3 testify in the way that he has that he has referred to
4 that as one of his sources.

5 MR. COOK: Very good.

6 JUDGE SIPPEL: And then he qualified in
7 terms of just how much of a source it was for him.

8 MR. COOK: Very good, Your Honor.

9 JUDGE SIPPEL: So that -- let's get rid of
10 that one right now.

11 The next question is with respect to
12 striking his entire testimony?

13 MR. COOK: Yes, Your Honor.

14 JUDGE SIPPEL: Really? On the basis of
15 what? On the basis of what you put in your trial
16 brief?

17 MR. COOK: On the trial brief and the
18 cross-examination, Your Honor.

19 JUDGE SIPPEL: Well, all right. Let me
20 hear from -- does anybody want to talk about that
21 briefly?

22 MR. ESTES: I guess first of all I'll ask

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1 you if we need to talk about it.

2 JUDGE SIPPEL: Not really. Not really.
3 I mean I can -- I can give you -- well, I'm not even
4 going to bother giving you all the reasons why, but
5 there is one particular reason that comes to mind, and
6 that is -- okay, where a case -- and this is in the TC
7 Systems case and I believe this is also -- comes up
8 somewhere in the Daubert decision, too.

9 But in any event, here is what the
10 principle is, and we're talking about the use of
11 specialized knowledge under Federal Rules of Evidence
12 702. It says where a case turns on expert testimony -
13 - and I think we've been since day one in this case,
14 we've been talking about what the experts are going to
15 bring to this case.

16 Where a case turns on expert testimony, a
17 party has a right to prove or to rebut a legal
18 contention with the benefit of the expert testimony.

19 So if I take this expert testimony and
20 throw it out here today, that's the end of it.
21 Period. And I'm not going to do that because I'm
22 going to be depriving Gulf Power of a right to a fair

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1 hearing under auspices of how we operate in this
2 country, okay?

3 MR. COOK: Very good, Your Honor.

4 JUDGE SIPPEL: Okay. So that one is gone.
5 Now do you have anything else?

6 MR. COOK: No, I concluded my cross.

7 JUDGE SIPPEL: Redirect, please.

8 Your motion is denied.

9 MS. LIEN: Your Honor, the bureau has no
10 questions.

11 MR. ESTES: Your Honor, I'm probably going
12 to go more than 15 minutes, if you'd like to go ahead
13 and take our break, and maybe I can cut out some of
14 the questions raised during Mr. Cook's cross.

15 JUDGE SIPPEL: Let's start with redirect,
16 and we'll take a -- you know, something close to
17 10:30.

18 REDIRECT EXAMINATION

19 BY MR. ESTES:

20 Q Mr. Spain, yesterday you were asked about
21 using the replacement cost methodology. Have you
22 previously used the replacement cost methodology in

1 your valuation projects?

2 A Yes. It's -- I don't -- I don't think
3 that in those cases it's been the method that I wound
4 up using as the basis for value, but certainly I
5 considered it in any valuation work that I've done.
6 It's essentially a requirement that we look at all
7 three methods, that being the sales comparison, the
8 income method, and the replacement cost method. So
9 certainly, yes, I have employed it in previous work
10 that I have done.

11 Q And I'm going to unfortunately skip around
12 a little bit because I'm going to go in the order that
13 Mr. Cook asked you. Mr. Cook asked you about the
14 depositions that you had reviewed prior to your
15 deposition. Did you tell Mr. Cook at your deposition
16 of other depositions that you had reviewed in this
17 case?

18 A Again, and my time line gets fuzzy, so I
19 apologize, but I think that I had reviewed the
20 depositions of the cable companies' representatives,
21 the four cable company representatives, prior to my
22 deposition.

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1 Q And did you utilize your view of those
2 representatives' depositions in formulating your
3 opinions in this case?

4 A Certainly it was information that
5 contributed to my understanding of the case and
6 contributed to my opinions as it relates to this case.

7 Q And specifically some of the references
8 you have given us already today about what was
9 testified to in those depositions?

10 A Yeah. More specifically, again, relating
11 to, for example, the ability to go underground and the
12 business decisions that they make based on cost of
13 underground versus overhead. I'm certain there are
14 others.

15 Q Did you get a chance earlier today to
16 fully explain what you mean by going underground?

17 A Let me make sure. As I understand it,
18 based on reading the deponents' -- the cable
19 companies' representatives, underground is an option
20 very much available to them. As a matter of fact, I
21 mean a couple of things I could cite was Mark
22 O'Ceallaigh said that 60 percent of their network in

1 Fort Walton was underground. Bruce Burgess was very
2 explicit in saying that underground is an option for
3 us. And Shayne Routh even said that underground --
4 the decision between underground and overhead is
5 purely a business decision for them.

6 Q How did you utilize this fact that there
7 is an option to go underground in formulating your
8 opinions?

9 A That contributed to the market method or
10 sales comparison method, and while ultimately I still
11 concluded that replacement cost was the most
12 appropriate methodology for determining fair market
13 value of the elevated corridor in this case, these
14 facts and circumstances certainly contribute to a
15 better understanding of the sales comparison method.

16 However, more work would need to be done
17 and more information would need to be available in
18 order to be able to rely on the sales comparison
19 method. You know, the facts and circumstances
20 surrounding transactions have a great deal of impact
21 on the applicability of one transaction to another
22 transaction or in another case or set of

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1 circumstances, and I don't have that information
2 available to me to complete that analysis.

3 Q You were asked yesterday about the fact
4 that you only looked at fair market value as a
5 valuation method in this case. In your analysis, as
6 you were doing your work, did you see any other
7 valuation methods that you deemed to be more
8 appropriate?

9 A Than the replacement cost methodology?

10 Q Than the replacement cost methodology and
11 specifically fair market value.

12 A Oh. No. It seemed to me reasonable, and
13 again I want to read lightly and not practice law, but
14 it certainly seems reasonable and plausible based on
15 my research that in a takings arrangement that fair
16 market value is the applicable standard of value.

17 Q If at any time it had seemed unreasonable
18 to you, would you have let everybody know that?

19 MR. COOK: Objection; leading. I mean I
20 have tried --

21 JUDGE SIPPEL: I'll sustain it. I'll
22 sustain it. You restrained yourself very well, Mr.

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1 Cook. Thank you.

2 BY MR. ESTES:

3 Q Yesterday there were some issues that Mr.
4 Cook asked you about that I believe you offered to
5 explain in further detail, and I don't think you were
6 asked the follow-up question. Do you remember any of
7 those issues?

8 A I think at the time that was a reference
9 to the market method, and you know, generally I would
10 say that I think I have offered my opinion as it
11 relates to what I found in my research regarding the
12 market method and, you know, the fact is I wound up
13 contacting general managers of co-ops -- cooperatives
14 and the CFO of a municipally owned system and the
15 statewide CFO of the Alabama rural electrics, and
16 another consultant, and so, you know, based on all of
17 this, I was able to formulate some opinions but still
18 ultimately did not rely on the market method.

19 Q What was your -- the ultimate opinion that
20 you came about utilizing the market method?

21 A And again, I caution that what I'm about
22 to say and its application because of the fact that I

1 mentioned earlier, applying the results of what I
2 found to this situation is difficult and should be
3 taken with care in all cases because the facts and
4 circumstances surrounding each transaction must be
5 analyzed in order to apply to another situation and
6 come up with a value in another situation.

7 But, you know, I found that rates in the
8 co-op world were typically in the mid to high teens,
9 frequently as high as about \$20, sometimes, you know,
10 as low as in the single digits as well. But it worked
11 out to an average of somewhere in the mid teens.

12 Q Any other issues that you were asked about
13 yesterday that you didn't get a chance to fully
14 explain that you think --

15 A As I sit here right now, not that I
16 recall.

17 Q This morning on cross, you were asked
18 about some issues you had with the FCC cable rate and
19 Mr. Cook specifically pointed you to page 12 of your
20 testimony. In doing your research on this case, did
21 you find, you know, other industry groups or state
22 public utility commissions who were dealing with the

1 same issue that you discuss?

2 A Yes, I did in doing my research. You
3 know, for example, the state of Maine has weighed in
4 on this issue. They regulate their rates at the state
5 level, and they have weighed in on the issue, and they
6 used --

7 Q And let me interrupt you.

8 A Uh-huh.

9 Q By "this issue," what are you referring
10 to?

11 A The issue regarding the appropriate rate
12 for attachers to existing poles. The Maine model, if
13 I can call it that, makes an attempt to allocate
14 common space on a pole differently than the FCC. It's
15 kind of a hybrid, but it's a little more along the
16 lines of an equal allocation, not completely equal,
17 but it's more along those lines. In fact, on a three-
18 attacher pole it shakes out 45 percent electric, 32
19 percent phone, and 23 percent cable.

20 In the state of Indiana, they have also
21 weighed in on the issue at the public service
22 commission there, and they chose a methodology that

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